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[online version](http://www.charltonslaw.com/hong-kong-stock-exchange-publishes-consultation-conclusions-on-listing-rule-amendments-consequential-on-new-statutory-regime-for-psi-disclosure/)

# Hong Kong Stock Exchange Publishes Consultation Conclusions On Listing Rule Amendments Consequential On New Statutory Regime For PSI Disclosure

## Introduction

The Stock Exchange of Hong Kong Limited (**Exchange**) published on 30 November 2012 its consultation conclusions (**Consultation Conclusions**) on the amendments to the Listing Rules (**Rules**) of the Main Board (**MB**) and the Growth Enterprise Market (**GEM**) consequential on the new statutory regime for disclosing price sensitive information (**PSI**) (referred to as “**inside information**” in the new statutory disclosure regime) proposed in its 3 August 2012 consultation paper (**Consultation Paper**).

The Securities and Futures (Amendment) Ordinance 2012 will take effect on 1 January 2013 to codify the PSI disclosure obligation of listed corporations into law in new Part XIVA of the Securities and Future Ordinance (**SFO**). The new provisions require a listed corporation to announce PSI as soon as reasonably practicable after the information has come to its knowledge. A corporation is taken to have knowledge of information when such information is known, or ought reasonably to be known, by one of its officers. The current non-statutory regime for disclosure of PSI is set out principally in by MB Rule 13.09(1) and GEM Rule 17.10. The main purpose of the Exchange’s proposed rule amendments is to eliminate overlap between the new statutory disclosure obligation and the requirements of the Rules. The proposed changes are therefore mainly to MB Chapter 13 and GEM Chapter 17.

The Exchange received 32 submissions during the two-month consultation period and has revised some rule amendments to take respondents’ comments into account. The rule amendments will become effective on 1 January 2013 when the SFO regime for PSI disclosure comes into force.

This newsletter provides a summary of the Listing Rule amendments.

A copy of the Consultation Paper, Consultation Conclusions and our newsletters on the new statutory regime for PSI disclosure and on the Consultation Paper can be obtained below:

The Consultation Paper is available [here](http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201208.pdf) ([see archive](ConsultationPaper.pdf)).

The Consultation Conclusions are available [here](http://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201208cc.pdf) ([see archive](ConsultationConclusions.pdf)).

Charltons' Newsletter of May 2012 on the new statutory PSI disclosure regime is available [here](/newsletters/hklaw/en/2012/155/nl-hklaw-20120511-155.html).

Charltons' Newsletter of August 2012 on the Consultation Paper is available [here](/newsletters/hklaw/en/2012/161/nl-hklaw-20120822-161.html).

## Rule Amendments In Relation To PSI Disclosure

### 1. Express statements regarding the role and duties of Securities and Futures Commission (SFC) and the Exchange

MB Rule 13.05 and GEM Rule 17.10(1) will be amended to state that responsibility for enforcement of the statutory obligation to disclose PSI vests solely with the SFC. Those rules refer to the Guidelines on Disclosure of Inside Information issued by the SFC (**SFC Guidelines**) and state that the Exchange will not give guidance on the interpretation or operation of the SFO or the SFC Guidelines. Where, however, the Exchange is aware of a possible breach of the statutory PSI disclosure obligation, the Exchange will refer it to the SFC. The Exchange will not take any disciplinary action itself under the Rules, unless the SFC considers it inappropriate to pursue the matter under the SFO and the Exchange considers action under the Rules for a possible breach of the Rules to be appropriate.

Concerns were raised in response to the consultation as to whether an issuer could face disciplinary actions from both the SFC and the Exchange in respect of the same set of facts, for example if a failure to disclose PSI under the SFO could also lead to the development of a false market. The Exchange responded that if it is aware of a possible breach of the statutory disclosure obligation, it will refer it to the SFC. This procedure will apply equally where the same set of facts also involves a possible breach of the Listing Rules. If the SFC decides to bring proceedings for breach of the statutory obligation, the Exchange will not pursue a possible breach of the Listing Rules arising from the same set of facts. However, if the SFC informs the Exchange that it will not pursue the Exchange’s referral or bring proceedings under the statutory inside information regime, the Exchange may investigate and bring disciplinary action for possible breaches of the Listing Rules if it considers it appropriate.

The guiding principle however is that enforcement of the law must take priority over that of the Rules. In accordance with comments from respondents to the consultation, MB Rule 13.05 and GEM Rule 17.06 will be amended to clarify that the Exchange will not take any disciplinary action under the Rules unless the SFC considers it inappropriate to pursue the matter under the SFO. Accordingly, an issuer will not face enforcement action by the SFC and the Exchange at the same time, in respect of the same set of facts.

### 2. Deletion of the majority of MB Rule 13.09(1) and GEM Rules 17.10

Almost all respondents agreed to delete the current MB Rules 13.09(1)(a) and 13.09(1)(c) and GEM Rules 17.10(1) and 17.10(3) which relate to the disclosure of information necessary to enable the Exchange, shareholders and the public to appraise the position of an issuer group or which might be reasonably expected materially to affect the market activity in and the price of its securities in order to avoid overlap with the new statutory PSI disclosure requirements under the SFO.

### 3. Obligation to avoid false market to be retained as new MB Rule 13.09(1) and GEM Rule 17.10(1)

#### Proposal

The obligation to disclose information necessary to avoid the establishment of a false market is currently contained in MB Rule 13.09(1)(b) and GEM Rule 17.10(2). The Exchange proposed to retain the obligation as it supports the execution of the Exchange’s statutory obligation under section 21 of the SFO to maintain an orderly, fair and informed market for the trading of securities. The Exchange further proposed to amend the wording from “avoid the establishment of a false market” to “correct or prevent a false market”.

#### Comments received

The Exchange reports that while 75% of respondents agreed to retain the obligation to avoid a false market, half of the respondents disagreed with the proposal to amend the wording to “correct or prevent a false market”.

The concerns or comments from the respondents include:

1. it is difficult to distinguish between the proposed obligation to correct or prevent a false market and the new statutory PSI/ inside information disclosure obligation under the SFO and there may be an overlap as a result;
2. an issuer should only be obliged to disclose information when it becomes aware of any or any possible false market but it should not be obliged to disclose information to prevent a false market; and
3. it is unreasonable to expect issuers to monitor trading in their shares for evidence of a false market so as to be able to correct it, and it is not practicable for issuers to correct a false market as the market behaviour which caused it can be beyond the control of the issuer.

#### Exchange’s response

The Exchange stresses that there will be no overlap between the statutory PSI disclosure obligation under the SFO and the obligation under the new MB Rule 13.09(1). An example of where a piece of information is not PSI/ inside information but is information necessary to avoid a false market would be where market rumours concerning an issuer give rise to unusual trading movements in its securities.

To address respondents’ concerns, the Exchange will modify MB Rule 13.09(1) and GEM Rule 17.10(1) so that issuers are only required to disclose information necessary to avoid a false market as soon as reasonably practicable when:

1. in the view of the Exchange, there is or there is likely to be a false marketing in the issuer’s securities; and
2. after consultation with the Exchange.

A note will also be added to MB Rule 13.09(1) and GEM Rule 17.10(1) to require an issuer to contact the Exchange as soon as reasonably practicable if it believes that there is likely to be a false market in its securities.

Under New MB Rule 13.09(2) and GEM Rule 17.10(2), where an issuer is required to disclose inside information under the SFO, it must simultaneously announce the information. An issuer is also required to simultaneously copy to the Exchange any application to the SFC for a waiver from the requirement to disclose PSI and to promptly copy to the Exchange the SFC’s decision whether to grant such a waiver.

### 4. Exchange to continue monitoring market after the implementation of statutory regime

#### Proposal

In order for the Exchange to be able to discharge its duty under section 21 of the SFO to ensure an orderly, informed and fair market in securities traded on the Exchange, the Exchange needs to be able to monitor the market by making enquiries of listed issuers regarding unusual price or trading movements, the possible development of a false market in their securities and other relevant matters. The Exchange therefore proposed retaining MB Rule 13.10 and GEM Rule 17.11.

Under the proposed revised MB Rule 13.10 and GEM Rule 17.11, if the Exchange makes an enquiry, an issuer must respond promptly to the Exchange in one of the following two ways:

1. provide to the Exchange and, if requested by the Exchange, announce any information relevant to the subject matter(s) of the enquiries available to it; or
2. if appropriate, and if requested by the Exchange, publish a standard announcement (**Standard Announcement**) confirming that, the directors, having made due enquiry, are not aware of:
	1. any reasons for the price (or volume) movements;
	2. relevant information concerning the subject matter of the Exchange’s enquiry (**2nd Confirmation**);
	3. any information which must be announced to correct or to prevent a false market in the company’s securities (**3rd Confirmation**); or
	4. any inside information under Part XIVA of the SFO that needs to be disclosed (**4th Confirmation**).

#### Comments received

This proposal was one of the two areas of the Consultation Paper which attracted the most opposition and comments.

Some respondents expressed concern at the extent of internal enquiries necessary to satisfy the requirement of “due enquiry” before issuing a Standard Announcement. They also queried whether it is practicable for issuers to make “due enquiry” given that an issuer is required to make a Standard Announcement promptly and whether issuers will have sufficient time to verify the facts and seek professional advice before the Standard Announcement.

Respondents also opposed the content of the new Standard Announcement. The proposed 2nd Confirmation was challenged on the ground that there are circumstances where an issuer is aware of the relevant information concerning the enquiry of the Exchange but the information does not fall within the PSI disclosure obligation under the SFO or the Rules and is therefore inappropriate for the issuer to confirm it is not aware of the relevant information. Examples of tie circumstances are when the information is not material or where a safe harbour under the SFO applies.

In relation to the 3rd Confirmation, respondents expressed that a false market can appear to exist because of irregular trading activities in an issuer’s shares which are outside the control of the issuer, and it would therefore be difficult for an issuer to take action to prevent or correct it. It is only when issuers have sufficient information or evidence that a false market exists or, if there are market rumours about the issuer, that issuers should be obliged to take action to prevent or correct the false market. Moreover, paragraphs 79 and 80 of the SFC Guidelines state that issuers are generally not obliged to respond to media speculation and market rumours.

There was a comment that the 4th Confirmation should be confined to information that is relevant to the subject matter of the enquiry, as is currently the case. Further, since the obligation to disclose PSI under the SFO will be a statutory obligation, there should be no need for the Exchange to require an issuer’s announcement confirming that it has not breached a statutory obligation.

#### Exchange’s response

In view of respondents’ concerns, the Exchange agrees to substitute the “due enquiry” requirement in relation to the Standard Announcement with a requirement for the issuer to have made “such enquiry with respect to the issuer as may be reasonable in the circumstances”. The Exchange believes that this revised requirement takes into account the individual circumstances of each issuer and at the same time provides an element of objectivity to the extent of enquiries necessary.

The Exchange acknowledges that there may be circumstances where an issuer may be aware of information which may be relevant to unusual trading movements in its securities but the information is not discloseable, making it inappropriate for the issuer to make the 2nd confirmation. Accordingly, the Exchange agrees to remove the 2nd Confirmation.

In relation to paragraphs 79 and 80 of the SFC Guidelines, which provide that issuers are generally not obliged to respond to media speculation and market rumours, the Exchange responds that the SFC Guidelines also state that the Exchange may under the Rules require a corporation to provide disclosure or clarification beyond that required by the SFO. The SFC Guidelines also state that there may be circumstances where market rumours may suggest that confidentiality of inside information may have been lost and disclosure will be required to prevent or correct a false market. Nevertheless, the Exchange is prepared to modify the wording of the 3rd Confirmation to require an issuer to confirm that it is not aware of “any information which must be announced to avoid a false market in the company’s securities” instead of the wording “prevent or correct”.

The wording of the 4th Confirmation will be modified and a note to the new MB Rule 13.10 and GEM Rule 17.11 will be introduced to make it clear that an issuer is not required to disclose inside information under the Rules if disclosure of the information is exempted under the new PSI provisions of the SFO.

Issuers should note that the Exchange reserves the right to direct a trading halt of an issuer’s securities if an announcement under MB Rule 13.10 or GEM Rule 17.11 cannot be made promptly.

The Exchange believes that the Confirmations are necessary for maintaining a fair and orderly market and it stresses that an announcement under MB Rule 13.10 or GEM Rule 17.11 will only be necessary if, after consideration of the facts, the Exchange is of the view that publication is necessary.

### 5. Trading halts

#### Proposal

The SFO does not specify whether a trading halt is required pending the disclosure of PSI. The current obligation on an issuer is to apply for a trading suspension where disclosure under MB Rules 13.09(1) and/ or 13.10 (GEM Rules 17.10 and/ or 17.11) cannot be made as soon as reasonably practicable, is not expressly set out as a rule. Therefore, a new Rule 13.10A and a new GEM Rule 17.11A were proposed by the Exchange to expressly require an issuer to request a trading halt if an announcement cannot be made promptly in any of the following circumstances:

1. where an issuer has information which must be disclosed under the new MB Rule 13.09 or GEM Rule 17.10;
2. an issuer reasonably believes that there is PSI or inside information which must be disclosed under the new statutory disclosure obligation under the SFO; or
3. PSI may have been leaked where it is the subject of an application to the SFC for a waiver from compliance with the new statutory disclosure obligation or where it is exempt from the new statutory disclosure obligation (except if the exemption concerns disclosure prohibited by Hong Kong law or an order of a Hong Kong court).

#### Comments received

Some respondents suggested that issuers should be allowed to request a trading halt or a trading suspension.

#### Exchange’s response

“Trading halt” will be defined in the revised Rules as an interruption of trading in an issuer’s securities requested or directed pending disclosure of information under the Rules and extending for no more than two trading days.

The Exchange agrees with the comment that the rules should be amended to allow an issuer to apply for a trading halt or a trading suspension (i.e. a suspension of trading lasting for more than two trading days) but not just a trading halt.

Trading halts are a new concept on which the Exchange is consulting currently, as detailed in our newsletter on this subject, available [here](/newsletters/hklaw/en/2012/160/nl-hklaw-20120815-160.html).

### 6. Duty to preserve confidentiality of inside information

The current note 2 to MB Rule 13.09(1) and to GEM Rule 17.10 imposes an obligation on directors of issuers to maintain strict confidentiality of PSI until it is announced. Considering that the new PSI provisions of the SFO only require preserving confidentiality of information as a condition for relying on the exemptions under the new PSI disclosure regime, but do not impose an obligation to maintain confidentiality of inside information until disclosure, the Exchange proposed to upgrade note 2 to MB Rule 13.09(1) and to GEM Rule 17.10 to new MB Rule 13.06A and GEM Rule 17.07A.

A large majority of respondents supported the proposal. In response to some respondents’ comments that the obligation to maintain strict confidentiality of inside information until the formal announcement should be qualified by a reasonableness requirement, the Exchange agrees to revise the wording so that the directors are only required to “take all reasonable steps to maintain confidentiality” instead of the original proposal that they “must maintain confidentiality”.

## Other Amendments

### 1. Changes to defined terms

A large majority of the respondents supported the proposal that the terms “inside information”, “Inside Information Provisions”, “trading halt” be added as new defined terms under the Rules and references to “price sensitive information” be replaced by the term “inside information” to be consistent with the SFO.

The Exchange will include a note to the definition of the term “trading halt” to make it clear that a trading halt exceeding two trading days will automatically become a trading suspension. A note to the definition of the term “inside information” will also be included to clarify that when interpreting whether a piece of information may be “inside information” in the context of the Rules, the Exchange will apply Market Misconduct Tribunal decisions and SFC Guidelines.

### 2. Debt issues

Current MB Rule 37.47 and GEM Rule 30.40 impose an obligation on an issuer to immediately announce any information which, among others, is necessary for investors to appraise its position or may have a material effect on its ability to meet the obligations under its debt securities. According to MB Rule 37.44 and GEM Rule 31.04, where debt securities are guaranteed, the guarantor must also comply with these obligations. Given the new statutory disclosure obligation under the SFO will only impose an obligation on the issuer but not the guarantor, the Exchange proposed to clarify in the Rules and the Listing Agreement that a guarantor has an obligation to announce any information which may have a material effect on its ability to meet its obligations under the debt securities. Over 80% of the respondents agreed with the proposal and the Exchange will add new MB Rule 37.47A, paragraph 2A in MB Appendices 7C to 7E and 7H and GEM Rules 30.40A and 31.04(4) to make such clarification.

### 3. Guidance Materials

Additionally, it should be noted that all guidance materials published by the Exchange in respect of the obligation to disclose PSI will be repealed with effect from 1 January 2013.

The Exchange will also make various minor “plain writing amendments” to the Rules affected by the statutory codification of the PSI disclosure obligation.

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